No. 13019

In the United States Court of Appeals For the Ninth Circuit

ARNE O. BJORNSON, *Appellant,*

vs.

ALASKA STEAMSHIP COMPANY, a corporation, *Appellee.*

FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLEE

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QUESTION INVOLVED ON APPEAL

Under Rule 52, Federal Rules of Civil Procedure, should this court disturb the district court's findings as to the extent of damages sustained by appellant in a Jones Act suit, where all the conflicting testimony pertaining thereto, was heard orally by the district judge.

STATEMENT OF CASE

Appellant's damage action originally demanded a jury trial, which appellant waived subsequently (Tr. 6).

At the conclusion of the trial before the court, District Judge Bowen entered appropriate findings of fact and conclusions of law, finding appellant's total damages in the amount of $1,500.00 but reduced this amount by 50% to $750.00 because of appellant's con-

tributory negligence (Tr. 14). The original award of damages to appellant in the amount of $1,500.00 was based upon wages lost by appellant as the result of his injury in the approximate amount of $1,000.00 and the further sum of $500.00 for pain and suffering suffered by appellant.

Appellant appeals from the failure of the lower court to make any additional award for alleged permanent partial disability.

ARGUMENT

The legal effect which this court must accord the findings of the trial court based upon oral testimony is prescribed by the following portion of Rule 52, Federal Rules of Civil Procedure, reading as follows:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This rule, which is a restatement of the former federal equity practice, has been repeatedly applied by this court in refusing to disturb the trial court's findings based upon oral but conflicting testimony.

In the case of *Paramount Pest Control Service v. Brewer* (C.C.A. 9) 177 F.(2d) 564, this court said:

> "A presumption of the correctness attaches to the findings of the District Court. *United States v. Foster,* 9 Cir., 1941, 123 F.2d 32, and under Rule 52 (a), Federal Rules of Civil Procedure, 28 U.S.C.A., the trial judge's findings of fact will not be set aside unless clearly erroneous. The rule applicable here in the light of the conflicting char-

acter of the evidence in the record before us has been aptly stated in *Federal Savings & Loan Ins. Corp. v. First Nat. Bank, Liberty, Mo.,* 8 Cir., 164 F.2d 929, 932, in this language:

"'We are not at liberty to substitute our judgment for that of the trial court and on appeal that view of the evidence must be taken which is most favorable to the prevailing party, and if, when so viewed, the findings are supported by substantial competent evidence they should be sustained.'"

Again in the case of *Pacific Portland Cement Co. v. Food Mach. & Chemical Corp.* (C.C.A. 9) 178 F.(2d) 541, this court said:

"As to this, we are faced with the mandate of Rule 52 (a) of the Federal Rules of Civil Procedure, which bids us not to set aside findings unless they are 'clearly erroneous.' Federal Rules of Civil Procedure, Rule 52 (a). Under the interpretation which the Supreme Court, and this and other courts of appeal, have placed upon this section, the findings of a trial judge will not be disturbed if supported by substantial evidence. Full effect will always be given to the opportunity which the trial judge has, denied to us, to observe the witnesses, judge their credibility, and draw inferences from contradictions in the testimony of even the same witness. *Savage v. Lorraine,* 9 Cir. 1945, 148 F.(2d) 818; *Augustine v. Bowles,* 9 Cir. 1945, 149 F.(2d) 93, 96; *Lincoln National Life Ins. Co. v. Mathisen,* 9 Cir., 1945, 150 F.(2d) 292, 295-296. This is the meaning of the provision that findings should not be set aside unless clearly erroneous. *Grace Bros. v. Commissioner,* 9 Cir., 1949, 173 F.(2d) 170, 173-174."

In the case of *Orvis v. Higgins* (C.C.A. 2d) 180 F.

(2d) 537, Circuit Judge Frank stated the principles governing the reviewing powers of a Circuit Court, under Rule 52, when reviewing oral testimony of a trial court as follows:

> "(c) But where the evidence suporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances."

This statement was quoted with approval in the case of *Arnolt Corp. v. Stansen Corp.* (7 C.C.A.) 189 F. (2d) 5.

The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence *de novo. Nee v. Linwood Securities Co.* (C.C.A. 8) 174 F.(2d) 434.

In considering whether the trial court's findings are clearly erroneous, appellees must be given the benefit of all favorable inferences which may reasonably be drawn from the evidence. *Lassiter v. Guy F. Atkinson Co.* (C.C.A. 9) 176 F.(2d) 984.

The rule that the credibility of witnesses is a matter for the sole determination of the trial court is stated as follows in Federal Practice and Procedure (Baron and Holtzoff), Vol. 2, Section 1134, page 845, as follows:

> "At a trial without a jury the judge determines the credibility of oral testimony of the witnesses and the weight to be given it. An appellate court will not set aside findings of the trial court based upon such evidence."

NATURE OF APPELLANT'S INJURY

Appellant was injured January 14, 1949, when he fell to the deck of the SS "HAROLD WHITEHEAD," injuring his wrist. His wrist was placed in a cast by the Army Physicians in Yokohama (Tr. 38) and upon his return to the United States was treated by the Seattle Marine Hospital (Tr. 40). He rejoined the vessel April 20, 1949 (Tr. 46), at his regular sea wages of $195.00 per month plus additional monthly earnings estimated in the vicinity of $400.00 per month for longshoring and other additional heavy sea duties. Since returning to work he has had no medical treatment nor has he suffered any loss of wage earning capacity.

As is usual in personal injury cases, there was a decided conflict in the medical testimony, which was given orally in the lower court, as to the extent of appellant's injuries. Appellant called three medical witnesses, Dr. Ernest Burgess, Dr. Frederick Exner and Dr. B. E. McConville. Appellant called Dr. H. T. Buckner as its witness.

Dr. Burgess (who admitted he was frequently employed by appellant's counsel to testify for them in personal injury actions) (Tr. 21), was the only physician called by appellant who testified appellant had sustained any permanent partial disability to his wrist as the result of his injury. He thought appellant had sustained a disability estimated by him as 20% of the amputation value of the right elbow (Tr. 21) although all the medical testimony indicated appellant's injury was confined solely to the wrist and the elbow was not involved in the injury.

Dr. Burgess' testimony, based upon his single examination of appellant on June 10, 1950, and made solely for the purpose of testifying in the case, was confusing and vacillating, and obviously partisan. Dr. Burgess stated his examination disclosed there was a crepitus in appellant's wrist (Tr. 17), a twenty-five per cent impairment of gripping power (Tr. 17) and a thickening of the wrist (Tr. 16). None of these alleged findings were substantiated by the other medical witnesses.

On direct examination Dr. Burgess first testified appellant had sustained a fracture of the proximal carpal bones of the wrist (without identifying which of the eight carpal bones he meant) but on cross-examination admitted he could not make such a diagnosis (Tr. 25). Dr. Burgess stated he had initially made this diagnosis because of the alleged condition of "demineralization of the carpal bones" (Tr. 25) shown by the x-rays. He admitted that this condition could likewise be the result of the disuse by appellant of his wrist (Tr. 26). Dr. Burgess was unable to say if appellant had originally sustained a fissure fracture of the end of the right radius, but admitted if such had occurred, it was completely healed (Tr. 24). Dr. Burgess found some impairment in the flexion of appellant's wrist at the time of his examination of June 10, 1950 (Tr. 15).

Dr. McConville found that on March 8, 1950, when he examined appellant at appellant's request, appellant had a slight restriction of wrist flexion of ten per cent (Tr. 107). He stated there was a questionable fissure fracture of the end of the right radius, but it had healed

completely (Tr. 108). Dr. McConville did not testify that appellant had sustained any permanent injury to his wrist.

During the trial, appellant called Dr. Exner, an x-ray expert, to examine the x-ray photographs already in evidence. No shadow box was available so he was obliged to inspect them by holding the plates against the court house window (Tr. 75). Dr. Exner did not corroborate Dr. Burgess' testimony that there was a possible fracture of the carpal bones of appellant's wrist nor any demineralization of those bones. He only found the end of the right radius slightly irregular (Tr. 74) which Dr. Exner stated might possibly be a healed fissure fracture of the radius (Tr. 76). Dr. Exner, like Dr. McConville, did not testify that appellant had sustained any permanent injury to his wrist.

Dr. Buckner, one of the leading orthopedic surgeons in the Northwest, examined appellant on July 31, 1950, at the request of appellee. Dr. Buckner's examination was the most recent of all the examinations. He stated appellant made no complaints of any stiffness of his right wrist and his examination disclosed none (Tr. 59). There was no thickening or crepitus present in apppellant's wrist (Tr. 67) in his opinion.

Dr. Buckner had the benefit of comparison of the x-rays he took with those taken March 8, 1950, by Dr. McConville, his office associate. It was Dr. Buckner's opinion appellant had originally sustained a fissure fracture of the right wrist "which is now completely healed and hardly visible" (Tr. 61). Dr. Buckner found no evidence of any fracture of the carpal bones of ap-

pellant's right wrist (Tr. 61) nor evidences of demineralization of those bones (Tr. 61) either on his own x-rays, on those of Dr. McConville or on those of Dr. Burgess, Dr. Buckner stating all three sets of x-rays were identical in appearance (Tr. 67-68).

SUBSTANTIAL EVIDENCE APPELLANT SUFFERED NO PERMANENT WRIST DISABILITY

On direct examination, Dr. Buckner stated, "I thought he made a complete recovery" (Tr. 64).

On cross-examination, he further testified:

> "Q. Your testimony is this man has no residual disability whatsoever?
>
> A. I think he has made a very good recovery.
>
> Q. Would you answer the question, please?
>
> A. Yes.
>
> Q. In your opinion, this man has absolutely no residual disability whatsoever?
>
> A. In my opinion he hasn't." (Tr. 68, 69)

The evidence presented a conflict between the opinions of Dr. Burgess and Dr. Buckner as to whether appellant had made a complete recovery from his injury. The credibility of these conflicting witnesses was required to be resolved by the trial court, who stated he did not believe Dr. Burgess' testimony (Tr. 121).

In summarizing his conclusions as to the medical testimony elicited, the trial court said:

> "The only thing I would add to the nature and extent of the damages by way of clarification, if any is needed, is that this was a very simple and not a bad bone fracture. So far as the bruising of the tissues is concerned, the Court heard certain

testimony and expert discussion of those possibilities, but the Court was not greatly impressed by any of it. Of course, we all know that when one falls he is likely to sustain some bruising of the cartilaginous material at the end of bones the same as other places, but there is no reason for finding in this case from the discussions of expert witnesses about that point anything unusual or distinctly definite as to the extent of the cartilaginous bruising or trauma or traumatic injury to the covering of the bone ends.

"So far as the fracture is concerned, it might be described as the beginning of a fracture. There was nothing displaced and it was nothing more than a crack in the bone with no displacement whatever and no serious consequences so far as healing of the fracture is concerned, so I wish just a simple form of finding presented carrying into effect that situation." (Tr. 119-120)

In so evaluating Dr. Burgess' testimony, the trial court was heavily reinforced by the record which showed that Dr. Burgess' opinion in many important particulars was not only not corroborated by the other medical witnesses but in certain instances, flatly contradicted by them. The trial court correctly concluded that the weight of the evidence and inferences therefrom established that appellant had sustained a minor (fissure) fracture of the end of the right radius, from which he had recovered as testified to by Dr. Buckner and as confirmed by the record facts of the short duration of appellant's disability, his return to continuous heavy sea employment at remarkably high wages, and the minimal medical treatment required.

The trial judge, as the trier of the fact and of the credibility of the witnesses whom he heard, had the right to disbelieve them or any of them because of the manner in which he testified, the character of his testimony or because of contradictory testimony.

Certain testimonial evaluation intangibles, not reflected in the cold record, inhere in the trial court's determination of the credibility of witnesses. The demeanor of the witness on the stand, his frankness, the tone of his voice and the rove of his eye often furnish valuable but unrecorded clues to the veracity of the witness.

For this reason Rule 52 enjoins "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," an opportunity denied an appellate court.

Since appellant voluntarily waived a jury trial and elected to have the case tried to the court, it comes with especial ill grace for him to indulge in certain insinuations in his brief reflecting on the fairness of the able trial judge in appraising the testimony introduced at the trial. In asking this court to disregard Rule 52 and weigh the evidence *de novo,* appellant is indulging in a frivolous appeal.

CONCLUSION

Since the trial court's findings that appellant had not sustained a permanent injury to his wrist is not clearly erroneous and is supported by substantial record evidence, we submit the findings of fact, conclusions of law and the judgment of the lower court should be affirmed.

Respectfully submitted,

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